

No. 834

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

FRED KOSTERING,

Appellant,

vs.

SEATTLE BREWING AND MALT-
ING COMPANY (a Corporation),

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court
for the Northern District of California

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In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALT- ING COMPANY (a Corporation),	}	No. 13,219.
Complainant,		
vs.	}	
FRED KOSTERING,		
Defendant.	}	

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

Seattle Brewing and Malting Company, which is a corporation organized and existing under and by virtue of the laws of the State of Washington, and having its principal place of business at the city of Seattle in the State of Washington, files this, its bill of complaint, against Fred Kosterling, who is a citizen of the United States and a resident of the Northern Judicial District of the State of California, and thereupon your orator complains and says:

First.—That for upwards of eight years last past it has been, and now is, engaged in the business of producing, manufacturing and brewing beer at the city of Seattle in the State of Washington, under its corporate name of Seattle Brewing and Malting Company, and that said beer so as aforesaid produced, manufactured and brewed by your orator has been during all of said time, and still

is, known and designated by the trade name of "Rainier Beer." That for upwards of three years last past your orator has been engaged in shipping large quantities of said beer to the city and county of San Francisco and other places within the State of California for the purpose of sale in the said city and county of San Francisco and other places in the State of California, and that a large portion of said beer so sold by your orator in said city and county of San Francisco and other places in the State of California has been, by your orator, bottled in certain dark glass bottles. That upon each of said bottles there has been fixed by your orator a peculiarly colored label, the design and color of which said label will more fully appear by the specimen of your orator's beer, bottled by it, which is herewith filed and marked Complainant's Exhibit "A," and a true and correct copy of which said label is as follows, to wit:



That the said trade name of "Rainier Beer" and the said devices upon said label have been applied to the said beer of your orator continuously since the year 1893, and the said trade name of "Rainier Beer" and the devices upon said label have long since, through user, become and now are indicative of the origin and ownership of the said beer of your orator.

That the said trademark is of the value of fifty thousand dollars (\$50,000.00) and upwards.

That your orator's use of said trademark last aforesaid has been continuous, uninterrupted, quiet and undisturbed, and has been acquiesced in throughout the world until the commission of the fraudulent acts of the defendant hereinafter complained of.

Second.—That by reason of the long experience and great care of the complainant in its said business, and of the good quality of the said beer so as aforesaid produced, manufactured, brewed and bottled by it as aforesaid, and distinguished as it is by the said tradename of your orator and the label shown upon Complainant's Exhibit "A," the said beer has become widely known throughout the Pacific States and Territories, and especially in the States of Washington, Oregon, California and Nevada, as a useful and valuable beverage, and has acquired and now has a high reputation as such, and has commanded and still commands an extensive sale throughout the Pacific States and Territories of the United States, and especially in the States of Washington, Oregon, California and Nevada, which is and has been a source of great profit to said complainant; and

that said beer, when bottled by said complainant as aforesaid, is known as such beer to the public and to the buyers and consumers thereof by the said label above described upon Complainant's Exhibit "A," and by the said tradename of "Rainier Beer."

Third.—That the defendant, Fred Kosterling, is now and at all times hereinafter mentioned was engaged in business in the city and county of San Francisco, State of California, in bottling and selling beer.

Fourth.—Your orator further says that the said defendant, in violation of the trademark rights of your orator, has, in the said city and county of San Francisco and elsewhere in the State of California, prepared, bottled and sold beer not bottled by your orator, but bearing a label which is a colorable imitation of the trademark of your orator, shown upon and contained in the label upon Complainant's Exhibit "A," which said label so as aforesaid used by said defendant will more fully appear by reference to the specimen of the said spurious beer bottled and sold by the defendant, which is herewith filed and marked Complainant's Exhibit "B," and a true and correct copy of which said last-named label is as follows, to wit:

LOS ANGELES BREWING CO'S

R HINEGOLD BEER

TELEPHONE SOUTH 814.

FRED KOSTERING, Sole Dealer for
SAN FRANCISCO, CAL.

MUTUAL LABEL CO LOS ANGELES

And your orator avers that the said label shown upon Complainant's Exhibit "B" is substantially identical in form and color with the form and color used by your orator upon the bottles containing the said "Rainier Beer" of your orator, as shown in the label upon Complainant's Exhibit "A." That said label of the defendant shown upon said exhibit "B" is calculated to deceive and mislead the public into the belief that the beer sold by the defendant under said label is the "Rainier Beer" of your orator; and further in this behalf complaining, your orator avers that one element of the wrong being committed by the defendant in fraud of your orator's trademark rights is his use upon said

label, shown in Complainant's Exhibit "B," of the words "Rhinegold Beer" and the picture of a landscape, and the arrangement of the words and devices upon said label. shown upon Complainant's Exhibit "B," in substantially the same form and arrangement and in substantially the same colors as the words and devices upon the said label upon Complainant's Exhibit "A," which said last-named label, together with the words and devices thereon, and the arrangement thereof, as applied to beer, are the sole and exclusive property of your orator, and have so been your orator's exclusive property for upwards of eight years last past. That the said use by the said defendant is calculated to deceive and mislead the public into the belief that the beer sold under the said infringing trademark is the beer of your orator. That the defendant's use of the words and devices, and the manner of their arrangement, and the color in which they are printed upon the label shown upon Complainant's Exhibit "B," is and has always been in fraud of your orator's rights and without the license, permission, privity, procurement, or consent of your orator. And your orator further avers that the defendant's said label, as shown upon Complainant's Exhibit "B," infringes both upon the trademark rights of your orator in and to the words and devices, and the manner of their arrangement, and the colors in which they are printed, shown upon the label in Complainant's Exhibit "A," and is a further infringement of your orator's trademark rights in and to the words "Rainier Beer."

Fourth.—And your orator respectfully represents that the defendant, well knowing of your orator's trademark rights, and of your orator's use of the label shown upon Complainant's Exhibit "A," as also used in connection with and affixed to bottles of the character shown in Complainant's Exhibit "A," has wrongfully and fraudulently instituted and carried on and is now carrying on an unfair and fraudulent competition against your orator, in violation of your orator's rights, by knowingly, wilfully, wrongfully and fraudulently exposing for sale and selling in the city and county of San Francisco, State of California, and elsewhere, a spurious beer, contained in bottles bearing an imitation of your orator's trademark, as above described, and otherwise simulating your orator's packages by the use of labels presenting the same general appearance to the eye as your orator's label shown upon Complainant's Exhibit "A," and by the use of bottles similar in size, shape and color, and general appearance to the eye as that shown by Complainant's Exhibit "A," and by means of all of these said tricks and devices the defendant has attempted and is now attempting to pass off his beer upon the public as and for the beer of your orator. That your orator's rights thus invaded by the defendant are of the value of fifty thousand dollars (\$50,000.00) and upwards.

Fifth.—In consideration whereof, and forasmuch as your orator is remediless in the premises except in this Court, and cannot have adequate relief save by the aid and interposition of this Honorable Court, to the end, therefore, that the said defendant may, if he can, show

why your orator should not have the relief hereby prayed for, and may make a full disclosure and discovery under oath of all the matters aforesaid, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true and perfect answer make, under oath, to the matters hereinbefore stated and charged and to the interrogatories hereinafter numbered and set forth; and that the defendant may be decreed to account for and pay over the income or profits thus unlawfully derived from the violation of your orator's rights, your orator prays that your Honors may grant a writ of injunction, issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining the defendant, his clerks, agents, attorneys; servants and employees, from keeping, offering for sale, or selling any beer not being the beer produced, manufactured, brewed or bottled by your orator, put up in bottles of the general form, shape and color of your orator's bottles and containing the label of the form, device and shape shown in Complainant's Exhibit "A," or in any other form, device or shape which shall be a colorable imitation of your orator's label, and perpetually enjoin and restrain the defendant, his clerks, agents, attorneys, servants and employees, and each of them, from keeping, offering for sale or selling any beer not being the beer manufactured, produced, brewed or bottled by your orator, under or bearing the label of or designated by the words "Rhinogold Beer," or the words or devices, or the manner of their arrangement, or the color of their printing, shown upon the label upon Complainant's Ex-

hibit "B," or any word or symbol calculated to deceive or mislead the public into the belief that the defendant's beer is the beer of your orator; and that the said defendant deliver up to your orator all bottles having thereon the said false labels, and also all such false labels in his possession or under his control, to the end that the same may be destroyed.

And that your Honors, upon the rendering of the decree above prayed, may assess or cause to be assessed, in addition to the profits to be accounted for by the defendant as aforesaid, the damages your orator has sustained by reason of the premises.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said Fred Kosterling, commanding him, on a day certain to appear and answer to this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

MILTON S. EISNER,
Solicitor for Complainant.

Interrogatories to be propounded unto the said defendant, and to be answered by the said defendant:

Interrogatory No. 1. Whether or not, if you have used the label shown upon Complainant's Exhibit "B," or if you have applied the words "Rhinegold Beer" and the picture of a landscape with the words and devices shown upon the label upon said Complainant's Exhibit "B," ar-

ranged in substantially the same form and printed in substantially the same colors as the words and devices upon the label upon Complainant's Exhibit "A," to beer not being the beer of the complainant? If yea, how many bottles bearing said labels have you sold, and when and to whom did you sell them, and what price did you receive for the same?

Interrogatory No. 2. What profits have you made or realized on each sale made by you of beer, bearing the devices shown upon the Complainant's Exhibit "B," or any similar devices.

MILTON S. EISNER,
Solicitor for Complainant.

State of California,
City and County of San Francisco. } ss.

E. F. Sweeney, of said city and county, having been duly sworn, deposes and says that he is the vice-president and general manager of Seattle Brewing and Malt-
ing Company, a corporation, the complainant herein and for that reason makes this affidavit for and on behalf of said complainant in the above-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

E. F. SWEENEY.

Subscribed and sworn to before me, this 27th day of March, A. D. 1902.

[Seal] JAMES M. ELLIS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed March 28, 1902. Southard Hoffman, Clerk.

Subpoena Ad Respondendum.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial Circuit,
Northern District of California.*

IN EQUITY.

The President of the United States of America, Greeting, to Fred Kosterling:

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco, on the fifth day of May, A. D. 1902, to answer a bill of complaint exhibited against you in said Court by Seattle Brewing and Malting Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, The Honorable MELVILLE W. FULLER,
Chief Justice of the United States this 28th day of

March, in the year of our Lord one thousand nine hundred and two, and of our Independence the 126th.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By W. B. Beazley,

Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for
the Courts of Equity of the United States.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of May next, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

SOUTHARD HOFFMAN,

Clerk.

By W. B. Beazley,

Deputy Clerk.

[Endorsed]:

United States of America, }
Northern District of California. } ss.

I hereby certify and return that I served the annexed Subpoena Ad Respondendum on the therein-named Fred Kostering by handing to and leaving a true and correct copy thereof with Fred Kostering, personally, at San Francisco, in said District, on the 28th day of March, A. D. 1902.

JOHN H. SHINE,

United States Marshal.

By E. A. Morse,

Office Deputy.

Filed March 29, 1902. Southard Hoffman, Clerk. By
W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Judicial
Circuit, in and for the Northern District of California.*

IN EQUITY.

SEATTLE BREWING AND MALT-
ING COMPANY (a Corporation),

Complainant,

vs.

FRED KOSTERING,

Defendant.

Order to Show Cause, etc.

On reading and filing the verified bill of complaint of the above-named complainant, and good cause appearing therefrom, it is ordered that the defendant above-named be and appear before this Court, at the courtroom thereof, in the Appraisers' Building, in the city and county of San Francisco, State of California, on Monday, the 7th day of April, 1902, at the hour of eleven o'clock A. M., then and there to show cause, if any he has, why a writ of injunction should not be issued in the above-entitled suit, enjoining and restraining the said defendant, his attorneys, servants, agents, and employees, and each of them, until the further order of this Court, from keeping, offering for sale, or selling any beer not being the beer produced, manufactured, brewed or bottled by the complainant, put up in bottles of the general form,

shape and color of the complainant's bottles, and containing the label of the form, device and shape shown in Complainant's Exhibit "A," filed with said bill of complaint, or in any other form, device or shape which shall be a colorable imitation of complainant's said label, and enjoining and restraining said defendant, his clerks, agents, attorneys, servants and employees, and each of them, from keeping, offering for sale or selling any beer not being the beer manufactured, produced, brewed or bottled by said complainant under or bearing the label of or designated by the words "Rhinegold Beer," or of the words or devices, or the manner of their arrangement, or the color of their printing, shown upon the label upon Complainant's Exhibit "B," filed with said bill of complaint or any word or symbol calculated to deceive or mislead the public into the belief that said defendant's beer is the beer of said complainant.

And on the hearing of this order to show cause the said complainant may use, read and refer to the said verified bill of complaint, and to the said exhibits "A" and "B" filed therewith, and may use, read and refer to such other evidence, either oral or documentary, as may be produced upon the hearing of said order, or which may be required by this Court on the hearing thereof.

And it is further ordered that a copy of the said verified bill of complaint be served upon said defendant in this case at least five (5) days prior to the return day.

Dated San Francisco, Cal., March 28, 1902.

WM. W. MORROW,
Judge.

[Endorsed]:

United States of America,
Northern District of California. } ss.

I hereby certify and return that I served the annexed order to show cause on the therein-named Fred Koster- ing, by handing to and leaving a true and correct copy thereof with Fred Koster- ing, together with a copy of the bill of complaint therein named attached thereto, personally, at San Francisco, in said District, on the 28th day of March, A. D. 1902.

JOHN H. SHINE,
United States Marshal.

By E. A. Morse,
Office Deputy.

Filed March 29, 1902. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Judicial
Circuit, Northern District of California.*

SEATTLE BREWING & MALTING
COMPANY (a Corporation),

Complainant,

vs.

FRED KOSTERING,

Defendant.

**Affidavit on Order to Show Cause Why Defendant Should
not be Restrained, Etc.**

State of California,

City and County of San Francisco.

} ss.

Fred Kosterling, being first duly sworn, says: That he is the defendant in the above-entitled action.

That the Los Angeles Brewing Company is a corporation duly incorporated and existing under and by virtue of the laws of the State of California, with its principal place of business at the City of Los Angeles in said State of California.

That said Los Angeles Brewing Company for upwards of ten years last past has been, and now is, engaged in the business of producing, manufacturing and brewing beer at the city of Los Angeles in the State of California under its corporate name of Los Angeles Brewing Company.

That in the month of February, 1902, this defendant obtained the right of bottling and selling the said beer so produced, manufactured and brewed by the said Los

Angeles Brewing Company in the city and county of San Francisco.

That thereupon this affiant erected beer bottling works at No. 1034 Harrison street, in said city and county, and commenced bottling and selling the beer of said Los Angeles Brewing Company on the 9th day of March, 1902.

That affiant thereupon selected the name "Rhinegold" as the name of the beer of the said Los Angeles Brewing Company, to be bottled and sold by him, and ordered of said Los Angeles Brewing Company a label which would distinguish the beer brewed by it and bottled and sold by affiant from any and all other beers where-soever and by whomsoever brewed and bottled.

That thereupon affiant received from said Los Angeles Brewing Company the label marked Complainant's Exhibit "B" in complainant's bill of complaint.

That immediately after receiving said label affiant filed with the Secretary of State of the State of California, at Sacramento, the capital of said State, affiant's claim to the said label as a trademark, with a fac-simile and description of such trademark and label, and with his affidavit attached thereto, certified to by a notary public of the city and county of San Francisco, State of California, setting forth that he, this affiant, was the exclusive owner of said trademark and label.

That thereupon, to wit, on the 19th day of March, 1902, the Honorable C. F. Curry, Secretary of State of the State of California, issued to this affiant a certificate in the words and figures following, to wit:

"No. 323. State of California, Department of State. I, C. F. Curry, Secretary of State of the State of California, do hereby certify that Fred Kosterling, located and doing business in the city and county of San Francisco, State of California, and being engaged in the business of bottling beer, duly filed in this office on the 19th day of March, A. D. 1902, a claim to trademark, to be used in connection with beer.

"Said Trademark consists of the word 'Rhinegold' together with pictures and design as shown on label to claim to trademark, a description of which is more fully set forth in the specification attached to and made a part of the claim to trademark above referred to. Witness my hand and the Great Seal of the State of California; at office in Sacramento, this 19th day of March, A. D. 1902.

[Great Seal]

C. F. CURRY,
Secretary of State.

By J. Hoesch,
Deputy."

That the following is the description set forth in the specification attached to and made a part of the said claim to said trademark referred to, to wit:

"My trademark consists of the word 'Rhinegold.' This has generally been arranged as shown in the accompanying fac-simile. The words 'Los Angeles' in blue letters are in the upper left-hand corner, and the words 'Brewing Co's' in the same color, are in the upper right hand corner. Between the words 'Los Angeles' and 'Brewing Co's' is a shield with a gilt border, the field

thereof containing a representation of a bear standing upon a rocky promontory upon which there is a fir tree, the Golden Gate with a setting sun with golden rays, in the distance. The center of the trademark contains a waving vermilion-red streamer with white border and blue background, upon the upper fold of which, in white letters, is the word 'Rhinegold,' the 'R' of which intersects a gilt encircled seal in the lower left hand corner, containing a representation of the river Rhine ending in falls, with rocky cliffs; upon the waters of the river are reflected the golden rays of a vermilion-red sun disappearing behind the hills; upon the lower fold of the streamer is the word 'Beer,' also in white letters. The whole trademark is surrounded by a vermilion-red border, as shown by the following fac-simile, to wit:



This trademark I have used in my business since the 10th day of March, 1902.

The class of merchandise to which the trademark is appropriated is beer, brewed by the Los Angeles Brewing Company, a corporation incorporated and existing under and by virtue of the laws of the State of California with its principal place of business at Los Angeles.

Other forms of type may be employed, or they may be differently arranged or colored, without materially altering the character of the trademark, the essential features of which are the words 'Rhinegold,' the shield with bear upon the promontory, and the river scene as shown in the foregoing fac-simile.

It is my practice to apply my trademark to the bottles containing the beer by means of suitable labels on which it is printed in colors as above described."

Affiant further says that he uses the said label upon bottles in which beer is ordinarily and generally bottled, and in which it has been the custom to bottle it for more than thirty years last past; that upon the bottles so used by him there are blown the words "Los Angeles Brewing Co., San Francisco," and affiant's monogram "F. K."

That it is not true that the said label of defendant is calculated to deceive or mislead the public into the belief that the beer sold by him under said label is the "Rainier" beer of complainant; that the object of placing affiant's label upon the beer bottled by him is to inform the public that the said beer is beer brewed by the Los Angeles Brewing Company, and bottled by affiant, and not beer brewed by the Seattle Brewing & Malting

Company, and sold by complainant under the name "Rainier."

And this affiant further states that it is not true that his said label infringes upon the trademark rights of said complainant or in or to the words or devices or the manner of their arrangements or the color in which they are printed or that the same is an infringement of complainant's trademark rights in or to the words "Rainier" beer;

Affiant further states that it is not true that he has wrongfully or fraudulently instituted or carried on or is now carrying on an unfair or fraudulent competition against said complainant in violation of plaintiff's rights by exposing for sale or selling in the city and county of San Francisco, State of California, or elsewhere, a spurious beer contained in bottles bearing an imitation of complainant's trademark or otherwise simulating complainant's packages by the use of labels presenting the same general appearance to the eye as complainant's label or by the use of bottles similar in size, shape and color and general appearance to the eye as that shown by complainant's label; or that by means of any trick or device, either as alleged in said complaint or otherwise, has affiant ever attempted or is now attempting, to pass off his beer upon the public as or for the beer of complainant. On the contrary, affiant's label shows plainly that he is engaged in selling beer brewed by the Los Angeles Brewing Company, and that he is offering to the public no other beer than beer brewed by the said

Los Angeles Brewing Company, with his trademark of "Rhinegold" thereon.

And further affiant saith not.

FRED KOSTERING.

Subscribed and sworn to before me this 14th day of April, 1902.

[Seal]

JOHN RALPH WILSON,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Received a copy of the within this 14th day of April, 1902.

M. S. EISNER,

Attorney for Complainant.

Filed April 14, 1902. Southard Hoffman, Clerk.

At a stated^d term, to wit, the March term, A. D. 1902, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco on Monday, the 14th day of April, in the year of our Lord one thousand nine hundred and two. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

SEATTLE MALTING AND BREW- ING COMPANY (a Corporation), vs. FRED KOSTERING, Defendant.	}	Complainant, Defendant.	No. 13,219.
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Order Granting Injunction Pendente Lite.

This cause came on this day to be heard upon complainant's application for injunction pendente lite—Milton S. Eisner, Esq., appearing as solicitor for complainant, and F. J. Castelbun, Esq., appearing as solicitor for defendant—and said matter having been heard upon the bill of complaint, order to show cause and restraining order, and affidavit of the defendant, and having been submitted to the Court, and the same being now fully considered, it is

Ordered that said application for injunction be and hereby is granted; that an injunction pendente lite, issue as prayed in the bill of complaint herein upon complainant's executing and filing a bond in the sum of five thousand dollars, and that defendant have ten days from this date within which to prepare and file a bill of exceptions herein,

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALT- ING COMPANY (a Corporation), Complainant,	}	No. 13,219.
vs.		
FRED KOSTERING, Defendant.	}	

Undertaking on Injunction.

Know all men by these presents, that we, Seattle Brewing and Malting Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and having its principal place of business at the city of Seattle, State of Washington, as principal, and John Rapp and John G. Rapp, both of the city and county of San Francisco, State of California, as sureties, are held and firmly bound, jointly and severally by these presents, unto Fred Kosterling, of the city and county of San Francisco, State of California, in the sum of five thousand dollars (\$5,000.00), lawful money of the United States, for the payment of which said sum, well and truly to be made, we bind ourselves, our and each of our successors, heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated at San Francisco, California, this 15th day of April, 1902.

The condition of the above obligation is such that whereas, on the 14th day of April, 1902, after due proceedings had in that behalf, an order was duly and regularly given and made by the above-entitled Court in the above-entitled action, directing that an injunction issue out of and under the seal of said Court enjoining and restraining the above-named defendant, Fred Kosterling, his attorneys, servants, agents and employees, and each of them, until the further order of said Court, from keeping, offering for sale or selling any beer not being the beer produced, manufactured, brewed or bottled by the complainant, put up in bottles of the general form, shape and color of the complainant's bottles, and bearing the label of the form, device and shape shown in Complainant's Exhibit "A," filed with the bill of complaint in said action, or in any other form, device or shape which shall be a colorable imitation of complainant's said label; and enjoining and restraining said defendant, his clerks, agents, attorneys, servants and employees, and each of them, from keeping, offering for sale or selling any beer not being the beer manufactured, produced, brewed or bottled by the said complainant under or bearing the label shown upon Complainant's Exhibit "B," filed with said bill of complaint.

And whereas, said Court, in and by said order, ordered and directed that said writ of injunction issue upon the filing of a good and sufficient undertaking, with two sureties to be approved by said Court, in the sum of five thousand dollars (\$5,000.00), conditioned for the payment by said complainant to said defendant of any and all

loss and damage which the said defendant might sustain by reason of the issuance of said writ of injunction.

Now, therefore, if the said complainant, Seattle Brewing and Malting Company, a corporation, shall well and truly pay or cause to be paid to the said defendant, Fred Kosterling, the amount of any and all loss and damage which the said defendant may sustain by reason of the issuance of said writ of injunction, then these presents are to be null and void; otherwise to remain in full force and effect.

Witness our hands and seals this 15th day of April, 1902.

SEATTLE BREWING AND MALTING COMPANY, a Corporation.

By E. F. SWEENEY,
Its Vice-President and General Manager.

JOHN RAPP. [Seal]

JOHN G. RAPP. [Seal]

United States of America, }
Northern District of California, }
City and County of San Francisco. }

John Rapp and John G. Rapp, being severally duly sworn, each for himself says:

That he is one of the sureties in the above undertaking, and is worth the sum specified in said undertaking over and above all of his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident of the State of California and a householder therein.

JOHN RAPP.

JOHN G. RAPP.

Subscribed and sworn to before me this 15th day of April, 1902.

[Seal] JAMES M. ELLIS,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed] April 15, 1902. Approved.

SOUTHARD HOFFMAN.

Clerk.

The within bond is approved this 15th day of April, 1902.

WM. W. MORROW.

Judge.

Filed April 15, 1902. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALT- ING COMPANY (a Corporation),	}	No.13,219.
vs.	Complainant,	
FRED KOSTERING,	Defendant.	

Injunction.

The above-entitled court having on the 28th day of March, 1902, upon reading and filing the verified bill of complaint of the above-named complainant in the above

entitled action, given and made an order directing the defendant above named to be and appear before this court at the courtroom thereof, in the Appraisers' Building, in the city and county of San Francisco, State of California, on Monday, the 7th day of April, 1902, at the hour of 11 o'clock A. M., then and there to show cause, if any he had, why a writ of injunction should not be issued in the above-entitled action, enjoining and restraining the said defendant, his attorneys, servants, agents and employees, and each of them, until the further order of this Court, from keeping, offering for sale or selling any beer not being the beer produced, manufactured, brewed or bottled by the complainant, put up in bottles of the general form, shape and color of the complainant's bottles, and bearing the label of the form, device and shape shown in Complainant's Exhibit "A," filed with said bill of complaint, or in any other form, device or shape which shall be a colorable imitation of complainant's said label; and enjoining and restraining said defendant, his clerks, agents, attorneys, servants and employees, and each of them, from keeping, offering for sale or selling any beer not being the beer manufactured, produced, brewed or bottled by said complainant under, or bearing the label of, or designated by the words "Rhinegold Beer," or of the words or devices, or the manner of their arrangement, or the color of their printing, shown upon the label upon Complainant's Exhibit "B," filed with said bill of complaint, or any word or symbol calculated to deceive or mislead the public into the belief that said defendant's beer is the beer of said complainant; which said

order to show cause also provided that on the hearing thereof the said complainant might use, read and refer to the said verified bill of complaint, and to the said exhibits "A" and "B" filed therewith, and might use, read and refer to such other evidence, either oral or documentary, as might be produced on the hearing of said order, or which might be required by this Court on the hearing thereof, and which said order to show cause provided that a copy of said verified bill of complaint be served upon said defendant at least five days prior to the return day of said order to show cause.

And it appearing to the satisfaction of the Court that a true and correct copy of said verified bill of complaint and of said order to show cause was duly and regularly served upon the said defendant personally, at the city and county of San Francisco, State of California, at least five days prior to said return day.

And the said order to show cause having come on regularly for hearing before the above-entitled Court on Monday, the 7th day of April, 1902 at 11 o'clock A. M., and having been duly and regularly continued from said 7th day of April, 1902, to the 14th day of April, 1902, at 11 o'clock A. M.; and said order to show cause coming on regularly to be heard in open Court the 14th day of April, 1902, at 11 o'clock A. M. the said complainant appearing by its solicitor, Milton S. Eisner, Esq., and the said defendant appearing by his solicitor, F. J. Castelhun, Esq.; and the said complainant having on said hearing read and referred to the verified bill of complaint of said complainant filed herein, and to the said

Complainant's Exhibit "A" and Complainant's Exhibit "B," filed therewith, and the said defendant having on the said hearing read the affidavit of Fred Kostering in said action, sworn to April 14th, 1902, and, after argument by respective counsel, said order to show cause having been submitted to the Court for its consideration and decision, and the Court after having duly considered the same and being fully advised in the premises, having duly given and made its order directing that the injunction hereinafter set forth issue out of the above-entitled court upon the filing by said complainant of a good and sufficient undertaking, with two good and sufficient sureties to be approved by said Court, in the sum of five thousand dollars (\$5,000.00), conditioned for the payment by said complainant to said defendant of any and all loss or damage which the said defendant may sustain by reason of the issuance of said injunction.

And the said complainant having, in accordance with said order, filed in said action a good and sufficient undertaking, with two sureties, in the said sum of five thousand dollars (\$5,000.00), conditioned as above set forth, and said bond having been duly and regularly approved by said Judge of this court.

Now, therefore, it is ordered, adjudged and decreed that, until the further order of this Court, the said defendant, Fred Kostering, his attorneys, servants, agents and employees, and each of them, be and they hereby are enjoined and restrained from keeping, offering for sale or selling any beer (not being the beer produced, manufactured, brewed or bottled by the complainant), under

or bearing the label shown in Complainant's Exhibit "A," filed with said bill of complaint, which said Complainant's Exhibit "A," now on file in the above-entitled action, is hereby specially referred to, and a true and correct copy of which said label upon said Complainant's Exhibit "A" is hereinafter set forth, or any other label, which shall be a colorable imitation of complainant's said label; and also from keeping, offering for sale or selling any beer (not being the beer manufactured, produced, brewed or bottled by said complainant), under or bearing the label shown upon Complainant's Exhibit "B," now on file in said action, which said Complainant's Exhibit "B" is hereby specially referred to, and a true and correct copy of which said label upon said Complainant's Exhibit "B" is hereinafter set forth.

The following is a true and correct copy of the complainant's said label shown upon said Complainant's Exhibit "A," hereinabove referred to:



The following is a true and correct copy of the label shown upon Complainant's Exhibit "B," hereinabove referred to:



Witness, the Honorable WILLIAM W. MORROW, Judge of the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, with the seal of said Court affixed, this 15th day of April, 1902.

WM. W. MORROW,
Judge.

[Seal]

Attest: SOUTHARD HOFFMAN,
Clerk.

[Endorsed]:

United States of America,
Northern District of California. } ss.

I hereby certify and return that I served the annexed injunction on the therein-named Fred Kostering, by handing to and leaving a certified copy thereof with Fred Kostering, personally, at San Francisco, in said District, on the 15th day of April, A. D. 1902.

JOHN H. SHINE,
United States Marshal.
By E. A. Morse,
Office Deputy.

Filed April 17, 1902. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING,
COMPANY (a Corporation),
Complainant,
vs.
FRED KOSTERING,
Defendant. } No. 13,219.

Petition for an Order Allowing an Appeal to the United States Circuit Court of Appeals.

The defendant, Fred Kostering, being dissatisfied with the order allowing an interlocutory injunction duly made

and entered herein on the 14th day of April, 1902, comes now by F. J. Castelhun, his solicitor, and petitions for an order allowing said defendant to prosecute an appeal from the said order allowing said interlocutory injunction to the Circuit Court of Appeals, Ninth Circuit, and also that an order be made fixing the amount of security which said defendant shall give upon said appeal.

April, 1902.

F. J. CASTELHUN,
Solicitor for Defendant.

[Endorsed]: Filed April 28th, 1902. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE MALTING AND BREWING
COMPANY (a Corporation),

Complainant,

vs.

FRED KOSTERING,

Defendant.

No. 13,219.

Assignment of Errors.

Now comes the above-named defendant, by F. J. Castelhun, his solicitor, and specifies the following as the particular errors upon which he will rely and which will be argued upon his appeal to the United States Circuit

Court of Appeals for the Ninth Circuit, from the order duly made and entered therein on the 14th day of April, 1902, granting the complainant an interlocutory injunction.

The United States Circuit Court for the Northern District of California, which made said order, erred therein as follows:

I.

In holding and deciding that defendant's label is an imitation of complainant's label.

II.

In holding and deciding that the use of defendant's label constituted unfair competition in trade on the part of said defendant.

III.

In holding and deciding that the defendant had so imitated complainant's label as to mislead and deceive the public and induce purchases of defendant's beer under the belief that it was complainant's beer.

IV.

In holding and deciding that defendant's label bore such a similarity to that of complainant that it was likely to impose on and deceive the public or ordinary purchasers.

V.

In granting complainant an interlocutory order enjoining and restraining said defendant from using his said label *pendente lite*.

VI.

In granting complainant an interlocutory order enjoining and restraining defendant pendente lite from keeping, offering for sale or selling any beer not brewed or bottled by the complainant under or bearing the label of or designated by the words "Rhinegold Beer," or of the words or devices or the manner of their arrangement or the color of their printing, shown upon defendant's label.

VII.

In failing to hold and decide that the said defendant's label was not an imitation of complainant's label.

VIII.

In failing to hold and decide that the use of defendant's label constituted fair competition in trade on the part of defendant.

IX.

In failing to hold and decide that the defendant had not imitated complainant's label and that defendant's label was not likely to mislead and deceive the public and induce purchases of defendant's beer under the belief that it was complainant's beer.

X.

In failing to hold and decide that defendant's label bore no such similarity to that of complainant that it was likely to impose on and deceive ordinary purchasers.

XI.

In failing to refuse complainant an interlocutory order restraining and forbidding defendant from using his said label pendente lite.

In order that the foregoing assignment of errors may be and appear of record, the said defendant presents the same to the Court.

F. J. CASTELHUN,
Solicitor for Defendant.

[Endorsed]: Filed April 28th, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING COMPANY (a Corporation), Complainant,	} No. 13,219.
vs.	
FRED KOSTERING, Defendant.	

Order Allowing Appeal and Fixing Amount of Bond.

Upon motion of F. J. Castellhun, Esq., solicitor for the defendant, and upon filing a petition for an order allowing an appeal together with an assignment of errors:

It is ordered that an appeal from the order granting an interlocutory injunction entered and issued herein on the 14th day of April, 1902, be and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit; that the amount of the bond for costs

upon said appeal to be given and filed by said defendant be and is hereby fixed at the sum of two hundred dollars, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 28, 1902.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed April 28th, 1902. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

SEATTLE BREWING AND MALTING	}	No. 13,219.
COMPANY (a Corporation),		
	Complainant,	
vs.		
FRED KOSTERING,	}	
		Defendant.

Bond on Appeal.

Know all men by these presents, that we, Fred Kostering, as principal, and Charles Kostering and D. Muller, as sureties, are held and firmly bound unto the Seattle Brewing and Malting Company, a corporation, in the full and just sum of two hundred (\$200) dollars to be paid

to the said corporation, its attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 30th day of April, 1902.

Whereas, lately at a session of the above-named court in the above-entitled action an order granting complainant an interlocutory injunction was entered and issued against the above-named principal.

And whereas, the said defendant obtained from the above-mentioned court an order allowing him to appeal from said order granting said interlocutory injunction.

And whereas, a citation directed to the said complainant, the Seattle Brewing and Malting Company, a corporation, is about to be issued citing and admonishing it to appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco in the State of California on the said appeal:

Now, the condition of the above obligation is such that if the said defendant, Fred Kosterling, shall prosecute his appeal to effect and shall answer all damages and costs that shall be awarded against him if he fail to sustain his appeal, then the obligation be void; else to remain in full force and virtue.

FRED. KOSTERING.

CHAS. KOSTERING.

D. MULLER.

United States of America,
 Northern District of California,
 City and County of San Francisco. } ss.

Charles Kosterling and D. Muller being first duly sworn, each, for himself, deposes and says:

That he is a householder in said district and is worth the sum of two hundred dollars, exclusive of property exempt from execution and over and above all his just debts and liabilities.

CHAS. KOSTERING.

D. MULLER.

Subscribed and sworn to before me this 30th day of April, 1902.

[Seal]

JOHN RALPH WILSON,

Notary Public in and for the City and County of San Francisco, State of California.

This bond is approved this first day of May, 1902.

WM. W. MORROW,

Judge.

[Endorsed]: Filed May 1, 1902. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Judicial
Circuit, in and for the Northern District of California.*

SEATTLE BREWING AND MALTING CO. (a Corporation),	Complainant,	} 13,219.
vs.		
FRED KOSTERING,	Defendant.	

Order Allowing Withdrawal of Original Exhibits.

It is hereby ordered, Complainant's Exhibits "A" and "B," being bottles with complainant's and defendant's labels thereon, be withdrawn for the purpose of being transmitted to the United States Circuit Court of Appeals, Ninth Circuit, and used on the appeal taken there-to.

May 1st, 1902.

WM. W. MORROW,
Judge.

[Endorsed]: Filed May 1, 1902. Southard Hoffman,
Clerk. By W. B. Beazley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

<p>SEATTLE BREWING AND MALTING COMPANY (a Corporation), Complainant,</p>	}	No. 13,219.
vs.		
<p>FRED KOSTERING, Defendant.</p>	}	

Certificate to Record on Appeal.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 36, inclusive, to be a full, true and correct copy of the record and all proceedings in the above-entitled cause (excepting therefrom Complainant's Exhibits "A" and "B" which by order of Court are transmitted herewith and form a part hereof), and that the same together constitute the transcript of the record upon the appeal of the defendant to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of said Circuit Court awarding an injunction pendente lite herein.

I further certify that the cost of the foregoing transcript of record is \$22.25, that the same was paid by the

defendant above-named, and that the original citation upon said appeal is annexed hereto.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 7th day of May, A. D. 1902.

[Seal]

SOUTHARD HOFFMAN,

Clerk United States Circuit Court, Ninth Circuit, Northern District of California.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Seattle Brewing Company and Malting Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 8th day of May, next, pursuant to an order allowing an appeal entered in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 13,219, wherein Seattle Brewing and Malting Company, a corporation, is plaintiff and defendant in error, and Fred. Kosterling is defendant, and plaintiff in error, and you are to show cause, if any there be, why the order rendered against the said plaintiff in error as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WM. W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this first day of May, 1902, A. D.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this first day of May, 1902.

M. S. EISNER,
Attorney for Defendant in Error.

[Endorsed]: No. 13,219. Circuit Court of the United States, Ninth Circuit, Northern District of California. Seattle Brewing and Malting Co., a Corporation, Complainant, vs. Fred. Kostering, Defendant. Citation. Filed May 1, 1902. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

[Endorsed]: No. 834. In the United States Circuit Court of Appeals for the Ninth Circuit. Fred Kostering, Appellant, vs. Seattle Brewing and Malting Company (a Corporation), Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the Northern District of California.

Filed May 7, 1902.

F. D. MONCKTON,
Clerk.